Office - Supreme Court, U.S.
FILED
DEC 8 1952
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

No. 487

TED VERNON HEAD,
Petitioner,

vs.

UNITED STATES OF AMERICA.

Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit and Brief in Support Thereof.

J. B. TIETZ,
257 South Spring Street, Los Angeles 12,
Counsel for Petitioner.

WESTERN PRINTING COMPANY, WHITTIER

TOPICAL INDEX

Page

Petition for writ of certiorari to the United States Court of Appeals for the Tenth Circuit 1

1. Summary of matters involved 1
2. Opinion of the court below 3
3. Statutory provision sustaining jurisdiction 3
4. Timeliness of the petition 4
5. Questions presented 4
6. Reasons relied on for the allowance of the writ 5

Brief in support of petition for writ of certiorari 7

1. Preliminary statement 7
2. Specification of errors 7
3. Summary of argument 8
4. Argument 10

I. A defendant is prejudiced by inconsistent instructions on a crucial point, particularly when the erroneous portion is sweeping and given last 10

II. A defendant is prejudiced by a closing jury argument of the United States attorney so improper that the Court of Appeals itself sees fit to condemn it 11

III. A defendant may not be precluded by the trial court from presenting evidence that he was classified in Class I-A-O for illegal reasons nor may he

Page

be precluded from presenting evidence that he was classified in Class I-A-O without any basis of fact 13

IV. A defendant is prejudiced when the Court of Appeals (attempting to cure the failure of the trial court in not making a necessary finding) finds that there was a basis of fact for the I-A-O classification and supports its finding by a line of reasoning that is self-contradictory 15

V. The Court of Appeals may not use hearsay to support its opinion that a basis of fact existed for the classification, nor could the selective service system have done so 18

VI. The hearsay evidence upon which the Court of Appeals predicated its decision was untrue; the appellant never before having faced the necessity of showing the truth on the point involved should have an opportunity to do so 21

VII. A selective service registrant, professing to be a conscientious objector to all participation in warfare, is not bound by all the views on the subject held by his spiritual teacher, even granting that their views actually differ 22

5. Conclusion 23

Appendix

Page

Appendix A—Selective Service Regulations.....App. 1

Appendix B—

Affidavits supporting argument VI

T. F. Thomasson.....App. 4

C. Nelson Nichols.....App. 7

Darnold B. McCord.....App. 11

James W. Russell.....App. 13

TABLE OF CASES AND AUTHORITIES CITED

Cases

August v. United States, 257 Fed. 388, 391, 394..... 12

Consolidated Edison case, 305 U. S. 197, 230..... 21

Hale v. United States, 25 F. 2d 430, 439..... 12

Joint Anti-Fascist Ref. Comm. v. McGrath, 71 S. Ct. 624..... 20

Niznik v. United States, 173 F. 2d 328..... 14

Niznik v. United States, 184 F. 2d 972..... 14

Nugent v. United States, ... F. 2nd 20

Robinson v. United States, 32 F. 2d 505, 510..... 12

United States ex rel. Phillips v. Downer, 135 F. 2d 521 14

United States v. Evergam, 102 F. Supp. 128..... 23

United States v. Geyer, ... F. Supp. 19

United States v. Goddard, ... F. Supp. 17

United States v. Relyea, ... F. Supp. 18

United States v. Remington, 191 F. 2nd 246..... 20

Page

United States v. Stiles, 169 F. 2d 445 14
United States v. Zieber, 161 F. 2d 90 14
Vierick v. United States, 318 U. S. 236, 247, 248 12

Code

Judicial Code, 28 U. S. C., sec. 1254 (1) 4

Selective Service Regulations

Sec. 1622.11 (32 C. F. R. 1622.11) ..... App. 2
Sec. 1622.14 (32 C. F. R. 1622.14) ..... App. 1
Sec. 1622.20 (32 C. F. R. 1622.20) ..... App. 1
Sec. 1660.1 (32 C. F. R. 1660.1) ..... App. 2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

No. .....

TED VERNON HEAD,
Petitioner,

vs.

UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

To the Supreme Court of the United States:

The Petitioner, Ted Vernon Head, presents this Petition for Writ of Certiorari and respectfully shows unto the Court as follows:

1. Summary of Matters Involved.

On April 1, 1952, in the United States District Court in and for the Western District of Oklahoma appellant was convicted by a jury of failing to submit to induction into the armed forces of the United States [R. 3]; he was sentenced on the same day to 3 years imprisonment [R. 4]; the indictment was under the

Universal Military Training and Service Act, as amended[1] [R. 1-2].

Appellant is a conscientious objector and is a member of the pacifist division of the Church of Christ denomination.[2] He asserted a claim to the Selective Service System for a classification designated at that time as IV-E[3] (subsequently designated I-O and presented his evidence but was given an I-A-O classification by his local board; this action was confirmed by the Appeal Board.

Appellant's fundamental contention is that the Local Board of the Selective Service System, by classifying him in Class I-A-O, found him to be a sincere conscientious objector and that there was no evidence before it on which to base the finding that his religious scruples with respect to participation in military activity were only to participation in killing; therefore, the order to report for induction was illegal being based on a classification unsupported by any evidence.

During the trial appellant attempted but was forbidden to show he was not given the claimed IV-E classification because the then existing regulation did not provide any duty or work obligation for the registrants so classified [R. 63]. The Court of Appeals did not pass on this claimed error. The Selective Service

---

[1]U. S. C., Title 50 App., Sec. 462.

[2]This "division" is 200 congregations strong and has more than a 100-year history of being a "peace" Church of Christ: Attorney General File No. A. G. 000.31 and Congressional Record, May 7, 1952.

[3]See Appendix "A" for the Selective Service System Regulations on this and the other SSS classifications mentioned herein.

System file and the testimony of the three local board members showed that there was no basis for giving appellant an I-A-O instead of the claimed IV-E classification [R. 75, 76, 80, 83, 100]. During the argument in the Court of Appeals appellant challenged appellee to show any basis of fact for the I-A-O classification. All attempts by counsel for appellee to meet this challenge were met by the court's statement:

> "That goes to the credibility of appellant and his credibility was decided in his favor by the Selective Service System and their decision on factual matters is final."

Nevertheless, the opinion of the Court of Appeals presented, for the first time, a "basis of fact" to support the classification. The "basis of fact" used by the Court of Appeals was the application of a hearsay fragment given to the Hearing Officer by the F.B.I. This fragment was never before the Local Board; also it is false, as will be argued later, herein.

Appellant also complains of his trial in the District Court with respect to its biased atmosphere and to the instructions given the jury. These points, and their disposition by the Court of Appeals will be particularized hereinafter.

2. Opinion of Court Below.

The opinion of the United States Court of Appeals is not yet reported in the *Federal Reporter*, but it appears in the record certified.

3. Statutory Provision Sustaining Jurisdiction.

The jurisdiction of this Court rests on Section 1254 (1) of the Judicial Code, 28 U. S. C.

4. Timeliness of the Petition.

The judgment of the Court of Appeals was entered on October 8, 1952. An order was obtained from the Court of Appeals extending until December 7, 1952 the time for filing a petition for a writ of certiorari. The petition for writ of certiorari is filed within the required time.

5. Questions Presented:

I. Is a defendant prejudiced by inconsistent instructions, on a crucial point, the erroneous one being sweeping and given last?

II. Is a defendant prejudiced by a closing jury argument of the U. S. Attorney that is so improper the Court of Appeals itself sees fit to condemn it?

III. Is a defendant to be precluded from presenting evidence that he was classified in Class I-A-O for illegal reasons, or to be precluded from presenting evidence that the local board classified him in Class I-A-O without a basis of fact?

IV. May a Court of Appeals support its opinion that there is a basis of fact for a classification by a construction based on an alleged fact not known to the local board and never

asserted by the United States Attorney at any time?

V. May hearsay be the sole basis for either a selective service classification, or a District Court conviction, or, as in this instance an affirmance by a Court of Appeals?

VI. May appellant, *de hors* the record, now show the complete falsity of the above-referred-to hearsay by affidavits (hereto annexed as Appendix B)?

VII. Assuming the truth of the hearsay is appellant bound by every view of his spiritual teacher?

6. Reasons Relied on for the Allowance of the Writ.

The decision of the Court of Appeals below raises questions of national and general importance:

(1) in connection with inconsistent jury instructions;

(2) in connection with misbehavior of a prosecuting attorney,

(3) in connection with admission of pertinent evidence;

(4) connected with the use of hearsay in the administration of the Universal Military Training and Service Act;

(5) in connection with use of hearsay by Courts of Appeal;

(6) should an appellant be permitted an opportunity to show the falsity of a fact never used

during his trial, nor during oral argument in the Court of Appeals but first used in the Opinion of the Court of Appeals?

(7) are the religious beliefs of an individual to be inferred from ones reputedly held by his teacher, particularly when the individual himself asserts a different belief?

WHEREFORE, your Petitioner prays that this Court issue a writ of certiorari to the Court of Appeals for the Tenth Circuit; and that thereupon the judgment of said Court of Appeals be set aside, and that the District Court below be directed to order the cause dismissed or to grant Petitioner a new trial.

TED VERNON HEAD
Petitioner,

By J. B. Tietz
Counsel for Petitioner.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

No. .....

TED VERNON HEAD,
Petitioner,
vs.
UNITED STATES OF AMERICA.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

1. Preliminary Statement.

For a statement showing the opinion of the Court of Appeals below, the basis on which the jurisdiction of this Court is claimed, the questions presented, and a statement of the case, reference is here made to the foregoing Petition for Writ of Certiorari.

2. Specification of Errors.

The judgment of the Court of Appeals below is contrary to law in that

I. The jury was incorrectly instructed;
II. The jury argument of plaintiff was prejudicial;
III. Evidence of defendant was erroneously refused;

IV. There was no basis of fact for the classification.

3. Summary of Argument.

I. A defendant is prejudiced by inconsistent instructions on a crucial point, particularly when the erroneous portion is sweeping and is given last.

II. A defendant is prejudiced by a closing jury argument of the United States Attorney that is so improper the Court of Appeals itself sees fit to condemn it.

III. A defendant may not be precluded by the trial court from presenting evidence that he was classified in Class I-A-O for illegal reasons nor may he be precluded from presenting evidence that he was classified in Class I-A-O without any basis of fact.

IV. A defendant is prejudiced when the Court of Appeals (attempting to cure the failure of the trial court in not making a necessary finding) finds that there was a basis of fact for the I-A-O Classification and supports its finding by a line of reasoning that is self-contradictory.

V. The Court of Appeals may not use hearsay to support its opinion that a basis of fact existed for the classification, nor could the Selective Service System have done so.

VI. The hearsay evidence upon which the Court of Appeals predicated its decision was untrue; the appellant never before having faced the necessity of showing the truth on the point involved should have an opportunity to do so.

VII. A selective service registrant, professing to be a conscientious objector to all participation in warfare, is not bound by all the views on the subject held by his spiritual teacher, even granting that their views actually differ.

4. Argument.

I.

A Defendant Is Prejudiced by Inconsistent Instructions on a Crucial Point, Particularly When the Erroneous Portion Is Sweeping and Given Last.

Appellant's defense centered around the fact that he had been illegally classified I-A-O.

An important portion of this defense was that the law[1] mandatorily required that a registrant claiming the IV-E type of classification be considered for this classification before being considered for the I-A-O type of classification.

The Court correctly instructed the jury on this point [R. p. 144] but, later on gave an instruction that concluded as follows:

---

[1] 32 C. F. R. §1623.2 Consideration of Classes.

1623.2 CONSIDERATION OF CLASSES.—Upon undertaking to classify any registrant, unless grounds are established to place the registrant in Class I-C under the provisions of section 1622.7 of this chapter, *the registrant shall be classified in the lowest class* for which he is determined to be eligible with Class I-A considered the highest class and Class V-A considered the lowest class according to the following table:

Class: I-A
I-A-O
IV-E
I-D
II-A
II-C
III-A
IV-A
IV-B
IV-C
IV-D
IV-F
V-A (Italics supplied)

[In effect until 28 September 1951 when designation I-O substituted for IV-E.]

"The facts as contained in the file may have been sufficient for the board to classify the defendant in IV-E, but if it felt under the facts that the defendant should be classified as I-A-O, it had the right to do that, and its decision is not subject to review by this Court" [R. p. 152].

Appellant submits that his cause was irreparably injured by the erroneous instruction that the board could classify him I-A-O even if the evidence before the board was sufficient for IV-E. The regulations made it mandatory for the board to consider the appellant for Class IV-E before considering him for Class I-A-O and mandatory that an IV-E be given if the facts before it were "sufficient," to use the Court's expression.

II.

A Defendant Is Prejudiced by a Closing Jury Argument of the United States Attorney So Improper That the Court of Appeals Itself Sees Fit to Condemn It.

The United States Attorney, in his closing speech said "if you come in with a verdict of not guilty I guarantee you no other draft board could come up here and tell you they haven't had but one. They will have nothing but pretended conscientious objectors . . . "

"MR. TIETZ: I ask that the jury be instructed to disregard that as going beyond the bounds of fair argument.

"THE COURT: Well, the jury is supposed to have good common sense and they can exercise it" [R. p. 135].

The trial court should have stopped the United States Attorney without waiting for defense counsel's objection; it was so held in the *Vierick* case where a similar argument was ruled improper.

Vierick v. United States, 318 U. S. 236, 247-248.

Also see:

August v. United States, 257 Fed. 388, 391, 394;
Hale v. United States, 25 F. 2d 430, 439.

An argument that failure to convict would impair efficiency of government agents was held reversible error, though objection was sustained.

Robinson v. United States, 32 F. 2d 505, 510.

The Court of Appeals, in its opinion stated "while we disapprove of argument of that character to a jury, we do not think Head was prejudiced thereby."

It is submitted that the jury should have been instructed to totally disregard this argument; that the trial court's remark was in effect an instruction they were to give the United States Attorney's argument the weight *they* believed it to be worth.

III.

A Defendant May Not Be Precluded by the Trial Court From Presenting Evidence That He Was Classified in Class I-A-O for Illegal Reasons Nor May He Be Precluded From Presenting Evidence That He Was Classified in Class I-A-O Without Any Basis of Fact.

During the trial appellant attempted to show the local board classified him in Class I-A-O:

1. Without any basis of fact, and
2. Because of extraneous reasons [that the registrants in Class I-O *at the time he was classified* had no obligation to do any work of National importance.]

Appellant subpoenaed the local board members and attempted to bring out from them additional facts to support the above conclusions, particularly the second, the first finding support in the selective service file [Exhibits 1-6].

Appellant was prevented from presenting such evidence, as follows:

> [R. p. 63]: "Q. The conscientious objector of the IV-E type had what responsibility if he was classified a conscientious objector, classification IV-E?"

Again:

> [R. p. 75]: "Q. (By Mr. Tietz): Will you please look at the file and pick out from the file,

taking as much time as you believe necessary, what the evidence was that led you to that conclusion?"

Again:

[R. p. 76]: "Q. Any evidence whereby you could fix a I-A-O classification on?"

Again:

[R. p. 99]: "Mr. Tietz: I want to find out, if that was discussed. I don't know. Maybe it was discussed.

The Court: Well, we will go to something else. It is not proper examination."

Again:

[R. p. 111]: "Mr. Tietz: It is more than a matter of feeling. It is a matter of their invariable practice that I believe I can bring out from this witness."

Also see pages 80, 81, 83 and 100.

The Court should have permitted appellant to present testimony that a basis other than a legal [evidentiary] one was used by the Selective Service System in classifying appellant.

Niznik v. United States, 184 F. 2d 972;
Niznik v. United States, 173 F. 2d 328;
United States v. Stiles, 169 F. 2d 445;
United States v. Zieber, 161 F. 2d 90;
United States ex rel. Phillips v. Downer, 135 F. 2d 521.

IV.

A Defendant Is Prejudiced When the Court of Appeals (Attempting to Cure the Failure of the Trial Court in Not Making a Necessary Finding) Finds That There Was a Basis of Fact for the I-A-O Classification and Supports Its Finding by a Line of Reasoning That Is Self-Contradictory.

The opinion of the Court of Appeals finds that a "basis of fact" existed for the classification of appellant in Class I-A-O.

1. The opinion recites "He did not sign Series XIV, Concientious Objection to War, in his classification Questionnaire." The opinion also states "On November 10, 1950, Head, for the first time, requested the special form for a conscientious objector."

   Appellant submits these two facts go to a different problem, to-wit: his sincerity. It is appellant's contention that neither the Selective Service System nor the courts may credit the truthfulness and sincerity of a registrant as a conscientious objector and at the same time discount it; that when the Selective Service System classifies him in Class I-A-O it certifies him to be a genuine conscientious objector; that it cannot draw a line for his scruples that neither he nor his evidence discloses; that it perhaps had the right to brand him a sham, because of the above two facts, but that if it does not do so it cannot thereafter deny him his claimed classifi-

cation if all the facts support his claim and none contradict it.

2. The opinion of the Court of Appeals puts two facts together to further support its conclusion that a "basis of fact" existed, namely: Head, in his Special Form for Conscientious Objectors (SSS Form No. 150), to quote the opinion, "asserted his religious beliefs were based upon the teachings of the Church of Christ at Waterford, and that the source of such teachings was the minister of that church, and that he relied for religious guidance upon such minister." The second fact being that when the F. B. I. interviewed the Waterford Minister, T. F. Thomasson, he, in the words of the opinion "stated that the teaching of the church at Waterford was that a person should not engage in carnal warfare, which meant the bearing of arms in time of war and that killing of other people, but that such church did not teach it was wrong to engage in non-combatant military duties and that 'the church had no objection to a member' engaging in non-combatant work."

The F. B. I. report was not in existence until many months after the local board gave appellant the I-A-O Classification. It is obvious therefore, that the F. B. I.-discovered fact (which will later be shown to be neither a fact nor of any probative value) was never before the local board. Its classification, consequently, was undisputedly without a basis of fact.

Appellant contends a registrant claiming a IV-E (now termed I-O) classification may not be given a I-A-O Classification unless there is definite evidence in the file on which to base the I-A-O Classification. Two District Courts have already explicitly so declared.

On June 25, 1952, Judge Murray, District of Montana, in an, as yet, unreported decision held:

> "Thereupon, after due consideration, the Court finds that the evidence is insufficient to sustain a conviction for the reasons that there is no basis in fact disclosed by the Selective Service file of defendant upon which Local Board No. 1 of Ravalli County, Montana, could have classified said defendant in Class I-A-O, and therefore the said Board was without jurisdiction to make such classification of defendant and to order defendant to report for induction under such classification."
>
> *United States v. Goddard,* ..... F. Supp. .....

On March 18, 1952, Judge McNamee, Northern District of Ohio in another, as yet, unreported decision held:

> "I think it would have been more difficult for the court to find the act of the board was without any basis in fact if the board has classified this man as I-A rather than I-A-O. They accepted the defendant's profession of sincere and conscientious objections on religious grounds as being truthful, but they attempted, and in my opinion without any basis in fact, to assert that while he

was sincere and conscientious, that sincerity and conscientiousness extended only to his active aggressive participation in military service and that he was not sincere in his statements that he was opposed to war and participation in war in all its forms."

United States v. Relyea, ... F. Supp. .....

V.

The Court of Appeals May Not Use Hearsay to Support Its Opinion That a Basis of Fact Existed for the Classification, Nor Could the Selective Service System Have Done So.

The F. B. I.-discovered fact, namely, the nature of T. F. Thomasson's pacifist beliefs is of no probative value.

The Selective Service Regulations do not afford a registrant an opportunity to see the investigation reports of the F. B. I. Appellant never had the opportunity or right to confront or cross-examine the "sources" of the reports. The Attorney General's instruction to his Hearing Officers is that they disclose to the registrants the "general nature" of any adverse information. This does not cure the hearsay taint.

On October 7, 1952, Judge Hincks, District of Connecticut, in an, as yet, unreported decision condemned this type of evidence:

"Congress was not using empty words when in Sec. 451 of the act it solemnly declared 'that in a free society the obligations and privileges of serving in the armed forces and the reserve components thereof should be shared generally, in accordance with a system of selection which is fair and just, and which is consistent with the maintenance of an effective national economy.' A system in which selections might be made in uninformed reliance upon the recommendation of an executive officer bottomed perhaps on secret police reports, would indeed make a mockery of that high declaration of policy. Only if the Act be construed to require that the investigative reports shall become a part of the record open to the appeal board and all concerned is the 'system of selection . . . just and fair' within our Anglo-Saxon concepts of justice and due process."

United States v. Geyer, ... F. Supp. .....

On November 10, 1952 the Court of Appeals, Second Circuit in an, as yet, unreported decision specifically approved the reasoning of the *Geyer* decision, *supra,* and quoted extensively from it.

In reversing a conviction the Second Circuit commented ". . . we think it was essential that the F. B. I. report, which results from that inquiry, should have been disclosed to the defendant. . . ."

Circuit Judge Frank said:

"At the hearing held by the hearing officer, he did not mention the F. B. I. investigative report;

nor did he give a summary of its contents or reveal the names of the persons who supplied the data described in the report." . . .

"To be sure, the defendant did not make a request, . . ."

"But even if defendant had made the request, the divulged information would not have afforded him adequate opportunity 'to prepare to answer and refute at the hearing such unfavorable evidence.' For that information would not have disclosed the identity of the witnesses who gave such 'evidence', and thus would not have put defendant in position to interrogate or impeach those witnesses.

"Accordingly, we think the hearing before the hearing officer violated the statute, for the reasons admirably stated by Judge Hincks in *United States v. Geyer,* ..... F. Supp. ....."

Nugent v. United States, ... F. 2nd .....

This Court found the classification action of the Attorney General arbitrary in *Joint Anti-Fascist Ref. Comm. v. McGrath,* 71 S. Ct. 624. The arbitrariness was chiefly due to the hearsay nature of the complained-of evidence as well as the ex parte conduct involved.

One of the reasons given by the Second Circuit, in *United States v. Remington,* 191 F. 2nd 246, reversing a perjury conviction, was the purely hearsay nature of the list of organizations referred to during the defendant's cross examination, the Joint Anti-Fascist case being cited as support.

Appellant submits the dictum of Chief Justice Hughes, in the *Consolidated Edison* case should apply:

> "Mere uncorroborated hearsay or rumor does not constitute substantial evidence."
>
> 305 U. S. 197, 230.

VI.

The Hearsay Evidence Upon Which the Court of Appeals Predicated Its Decision was Untrue; the Appellant Never Before Having Faced the Necessity of Showing the Truth on the Point Involved Should Have an Opportunity to Do So.

The only "fact" the Court of Appeals could find in the file that gave support to the I-A-O Classification was the F. B. I. report that T. F. Thomasson had stated ". . . but that such church did not teach it was wrong to engage in non-combatant military duties and that the church had no objection to a member engaging in non-combatant work."

When apprised he had been so quoted, T. F. Thomasson made an affidavit that shows he was misquoted, the most pertinent part being:

> "I read a letter from Brother Nelson Nichols in which it was stated that the F. B. I. man, who investigated Brother Ted Head, said that I said the Church of Christ, here where I worship, did not oppose taking part in non-combative service in carnal war. That certainly is a mistake. He

asked me whether I would be willing to minister the sick and wounded in hospitals. I told him I would, but I did not mean that I would join the army to do so; and that is the mistake."

The entire affidavit is set forth in Appendix B as are other affidavits of ministers of the same division of the Church of Christ.

VII.

A Selective Service Registrant, Professing to Be a Conscientious Objector to All Participation in Warfare, Is Not Bound by All the Views on the Subject Held by His Spiritual Teacher, Even Granting That Their Views Actually Differ.

Granting but not conceding that it is a fact T. F. Thomasson holds and teaches the "I-A-O" type of belief, even so, the appellant is not bound by this fact.

1. A pupil is not required to accept all the beliefs of his instructor, he may develop his own.

   For example: it is wrong to conclude a Catholic may not be a genuine conscientious objector because his church does not teach pacifism. In fact, the Selective Service System itself did not uniformly so rule, for during W W II, 162 Catholics were certified by local boards as genuine conscientious objectors and were sent to the Civilian Public Service Camps,[1] said Camps being established for regis-

[1]Special Monograph No. 11, Volume 1 (364 pages) "Conscientious Objection" published by the Selective Service System, 1950; pages 318-320.

trants found to be conscientiously opposed to any manner of participation in military activity.

2. A selective service registrant is to be judged by his own views, not necessarily by those held, or thought to be held, by a group from which he comes. Like guilt, conscience is personal. To judge a registrant by any other standard is wrong. The lower courts have already in different jurisdictions, accepted this philosophy as the law.

Recently, a District Court struck down the action of a Department of Justice Hearing Officer (and the Selective Service Appeal Board classification action based on it) because it was predicated on the assumption a conscientious objector could not originate from a Catholic background.

United States v. Everngam 102 F. Supp. 128.

also see:

Niznik v. United States, 173 F. 2d 328.

5. Conclusion.

It is submitted this Petition for Writ of Certiorari should be granted so as to correct the assigned errors committed against petitioner.

Respectfully submitted,

J. B. TIETZ,
Counsel for Petitioner.

APPENDIX

Appendix A. Selective Service Regulation.

Selective Service System Regulation §1622.20 (32 C. F. R. 1622.20):

"1622.20 Class IV-E: Conscientious Objector Opposed to Both Combatant and Noncombatant Training and Service. (a) In Class IV-E shall be placed any registrant who, by reason of religious training and belief, is found to be conscientiously opposed to participation in war in any form and to be conscientiously opposed to participation in both combatant and noncombatant training and service in the armed forces."

(b) Section 6 (j) of title I of the Selective Service Act of 1948 provides in part as follows:

> "Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code."

[This section was superseded on 28 September 1952 by §1622.14, below.]

Selective Service System Regulation §1622.14 (32 C. F. R. 1622.14):

"1622.14 Class I-O: Conscientious Objector Available for Civilian Work Contributing to the Maintenance of the National Health, Safety, or Interest. (a) In Class I-O shall be placed every registrant who would have been classified in Class I-A but for the fact that he has been found, by reason of religious training and belief, to be

conscientiously opposed to both combatant and noncombatant training and service in the armed forces."

(b) Section 6 (j) of title I of the Universal Military Training and Service Act, as amended provides in part as follows:

> "Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological or philosophical views or a merely personal moral code."

Selective Service System Regulation §1622.11 (32 C. F. R. 1622.11):

"1622.11 Class I-A-O: Conscientious Objector Available for Noncombatant Military Service Only. (a) In Class I-A-O shall be placed every registrant who would have been classified in Class I-A but for the fact that he has been found, by reason of religious training and belief, to be conscientiously opposed to combatant training and service in the armed forces."

(b) Section 6 (j) of title I of the Universal Military Training and Service Act, as amended, provides in part as follows:

> "Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code."

Selective Service System Regulation §1660.1 (32 C. F. R. 1660.1):

"1660.1 Definition of Appropriate Civilian Work.—(a) The types of employment which may be considered under the provisions of section 6(j) of title I of the Universal Military Training and

Service Act, as amended, to be civilian work contributing to the maintenance of the national health, safety, or interest, and appropriate to be performed in lieu of induction into the armed forces by registrants who have been classified in Class I-O shall be limited to the following:

(1) Employment by the United States Government, or by a State, Territory, or possession of the United States, or by a political subdivision thereof, or by the District of Columbia.

(2) Employment by a nonprofit organization, association, or corporation which is primarily engaged either in a charitable activity conducted for the benefit of the general public or in carrying out a program for the improvement of the public health or welfare, including educational and scientific activities in support thereof, when such activity or program is not principally for the benefit of the members of such organization, association, or corporation, or for increasing the membership thereof.

(b) Except as provided in subparagraph (2) of the paragraph (a) of this section, work in private employment shall not be considered to be appropriate civilian work to be performed in lieu of induction into the armed forces by registrants who have been classified in Class I-O."

[Effective 4 March 1952.]

Appendix B. Affidavits Supporting Argument VI.

Affidavit of T. F. Thomasson

I read a letter from Brother Nelson Nichols in which it was stated that the F.B.I. man, who investigated Brother Ted Head, said that I said the Church of Christ, here where I worship, did not oppose taking part in non-combative service in carnal war. That certainly is a mistake. He asked me whether I would be willing to minister to the sick and wounded in hospitals. I told him I would, but I did not mean that I would join the army to do so; and that is the mistake. I just overlooked telling him that.

Now, the local Church of Christ, meeting at Bently Street and Tim Bell Road in Waterford, California, where I worship, stands opposed to taking part in carnal war in any form, and we stand as a unit on that.

Our reason is that we are trying to follow Christ. He is our example, and he said, "Thou shalt not kill." When he was reviled he reviled *not* again. (I Peter 2:23) He said, "—they that take the sword shall perish with the sword." (also Rev. 13:10) (Matthew 26:52) He commanded the apostle Peter to put up his sword. The apostle Paul, said, "We wrestle not against flesh and blood," (Ephesians 6:12) and "the weapons of our warfare are *not carnal.*" (II Corinthians 10:4)

There are many statements in the Bible that condemn war, therefore, we cannot, as believers, conscientiously take part in carnal warfare. Ted learned these

things from the church here. He obeyed the Gospel here and was a member of this church. In all the teachings and preaching he heard here, these things were included. We believe he is conscientious in the matter.

Just before he ascended back to his father, Christ instituted his supper. (Matthew 26:30; Mark 14:22-24; Luke 22:16-20) And his disciples came together on the first day of the week to do this. (Acts 20:7) Paul said, "Forsake not the assembly." (Hebrews 10:25) They assembled on the first day of the week. (Acts 20:7) To be in the army would hinder one from doing this command.

Again, we are forbidden to be unequally yoked together with unbelievers. (II Corinthians 6:14)

Christ is the prince of peace. (Matthew 2:14). Christ came to bring peace, hence to follow him, one must follow that that makes for peace. He said, "Ye have heard that it hath been said, An eye for an eye, and a tooth for a tooth: *but I say unto you, That ye sist not evil:* but whosoever shall smite thee on thy right cheek, turn to him the other also. And if any man will sue thee at the law, and take away thy coat, let him have thy cloak also." These are Christ's sayings in his wonderful sermon on the mount. (Matthew 5:38-41).

These, together with many other statements in the New Testament, constitute the reasons why we oppose taking part in carnal war. I have been a minister for

more than fifty years, studying always, and searching the word of God for the full meaning and intent of scriptures necessary to the saving of souls. In all my study, and work with other preaching brethren, I have found no sanction to engaging in carnal warfare, only to the contrary.

November 10, 1952

T. F. THOMASSON
361 B Street
Box 181
Waterford, California

STATE OF CALIFORNIA,

County of Fresno.—ss.

On this 10th day of November, 1952, before me, the undersigned, a Notary Public in and for said County, personally appeared

MR. T. F. THOMASSON

known to me to be the person whose name subscribed to the within instrument and acknowledged that he executed the same.

Witness my hand and official seal.

D. E. PAULL
Notary Public in and for said County and State.

My Commission Expires Feb. 18, 1956.

Affidavit of C. Nelson Nichols

Greenville, S. C.
November 12, 1952

TO WHOM IT MAY CONCERN:

As a member and minister of the Church of Christ I want all to know our position regarding participation in carnal warfare and/or taking part in an armed force.

From my youth up I have been associated with the Church of Christ, known to the Federal Bureau of Investigation as the "peace Churches of Christ." I have been active in church work for eleven years and have been a minister for seven and one-half (7½) years.

This is not a new belief with these Churches of Christ. For many years the Church of Christ has been rooted in the faith that a Christian must not kill or even participate in an armed force of any kind. This was firmly proven and established in this country more than a century ago, and published nationally in 1848 (See A. Campbell's "Address on War" and also, Congressional Record, May 7, 1952). This has also been brought to light often in publications during peace-times and by the stand of our young men in each war since 1848 as well as before.

Our faith is based on New Testament Scriptures which teach Christians not to use force OR TO BE A PART OF AN ARMED FORCE, some of which scriptures follow: "Do violence to no man" (Luke 3:14); "Thou shalt not kill" (Matt. 5:21; Rom. 13:9); "We

ought to obey God rather than men" (Acts 5:29); "Be ye not unequally yoked together with unbelievers" (2 Cor. 6:14); and Christ said, "My kingdom is not of this world: if my kingdom were of this world, then would my servants fight" (John 18:36). Furthermore, we believe that Christ forbid us to take an oath when he said, "Swear not at all, neither by heaven . . . ; Nor by earth . . . Let your communication be yea" (yes) or "nay" (no) (Matt. 5:34, 35, 37); therefore we affirm a thing to be true to our knowledge.

In 1951 I wrote a letter to each of the Churches of Christ in this fellowship, asking each male member of this faith to attest to that fact by signing a form letter stating (besides other things too lengthy to mention here) as follows:

"This is to certify that we Churches of Christ are conscientiously opposed to participation in war in any form. Our belief in the Supreme Being involves duties superior to those arising from any human relation. . . . The basis of this faith is found in a multitude of Holy Scriptures, . . .

"Our position on this vital subject has been set forth many times across the Nation. . . .

"We do not know of an active minister in these Churches of Christ who does not oppose Christians' participating in carnal warfare. These Churches of Christ are not to be confused with many which wear the same name; we constitute a distinct fellowship.

"We submit this that all may know our position relative to our opposing participation in carnal warfare, and that we might be recognized as a distinct group or fellowship which now is and in the past has been, 'a peace church,' to use modern terminology."

These congregations (200 and some in number, scattered across the United States, England, and in British Central Africa), agreed to have the matter published before the officials of this land to firmly establish these facts in their minds. On May 7, 1952, the substance of the above mentioned and quoted form letter, along with excerpts from two publications concerning the matter, one dated 1848, A. Campbell's "Address on War" and 1945, Paul O. Nichols' "The Christian and Carnal Warfare," and the following explanation for Selective Service needs and information:

"In regard to selective service registrants:

"This body or fellowship has and is gaining recognition as to its unity regarding non-participation in carnal warfare. Each young man studies for himself the various aspects of the question, forms his own belief, and takes his own stand on his convictions. The church influences his position only in teaching and offering scriptural references for his personal study and then stands behind him wholeheartedly in encouragement and moral support"—C. Nelson Nichols.

Since the Congressional Record, May 7, 1952 and before that time many of the young men of this faith and fellowship have been mistreated and denied the

consideration due them through the Selective Service System's regulations and the Laws of the United States. In the past year the number of young men mistreated maliciously and arbitrarily by the Local SSS Boards (and often upheld by higher officials in the SSS) has increased and we feel that more must be said in defense of these young men who are willing to do all they can to upbuild the health and strength of this Nation as long as they are allowed to work through peaceable agencies and as long as they may be allowed to keep their civilian status and not offend their conscience by being made a part of an armed force.

This letter has assembled and set down together principles which should be known to all concerned. I, personally, desire to go on record in defense of these principles and in the defense of those sterling young men who are upholding these principles.

Sincerely,
C. NELSON NICHOLS
Minister—Church of Christ
849 Wilcox Ave.
Hollywood 38, Calif.

STATE OF SOUTH CAROLINA,
County of Greenville.

Affirmed and subscribed before me
this 12th day of November, 1952.

JOHN F. STRANGE
Notary Public for South Carolina.
My Commission expires at will of Gov.

Affidavit of Darnold B. McCord

November 14, 1952.

To Whom It May Concern:

As a minister of the Church of Christ for more than three years, I, the undersigned, make, to the best of my knowledge, this statement concerning the general position maintained by the church of Christ of my persuasion concerning carnal warfare, combatant and non-combatant.

First, be it understood, the church of Christ of my persuasion is not to be confused with some other religious bodies wearing the same appellative. In worship, organization and function, we are a fellowship distinct. Furthermore, be it understood that the said church of Christ is NOT a subversive fraternity, prating against civil government to the overthrow and/or the corruption of the same. The said organization is generally a pacific order in all of its endeavors. Its creed is the Bible; in brief, it earnestly and pacifically contends for a return of all religious peoples to the principles held by the church of the first century.

Since the Bible is the only creed of the said church of Christ, we have only the following to resort to in testimony of our position against carnal warfare—combatant and non-combatant:

(1). Our obligation to God is superior to all others (Matt. 22:37; Matt. 6:33; Acts 5:29).

(2). God forbids that His participate in carnal warfare (Jno. 18:36; Matt. 26:52).

(3). The weapons of our warfare are spiritual (2 Cor. 10; 3-4).

(4). We are to love our enemies—we can not do that and engage in carnal warfare (Matt. 5:44).

(5). To enter any branch of military service, combatant or non-combatant, we would be compelled to "swear" (take an oath), but the Bible forbids that we do so (Matt. 5:34).

(6). To serve in any way in the military service, we would be deprived of obeying the command to assemble on the first day of the week to worship with those of like faith; hence, we believe this would be in disobedience to God (Heb. 10:25; Acts 20:7; 1 Cor. 16:1-2).

Be it further understood that, according to the best of my knowledge, the fellow-ministers of my persuasion are united in their position regarding carnal warfare —combatant and non-combatant.

DARNOLD B. McCORD

Darnold B. McCord, Minister
church of Christ
552 North Wabash Avenue
Glendora, California.
and
General Delivery,
Ceres, California.

Subscribed and sworn to before me this 14th day of November, 1952.

TRINA McGARVEY,
Notary Public in and for the
County of Stanislaus, State of California.

Affidavit of James W. Russell

November 10, 1952

To Whom It May Concern:

I, James W. Russell, Evangelist of the Church of Christ, residing at 755 Orange Avenue, Fresno, California, labor with several congregations of the church, principally in central California. The congregations with which I labor in this area is a distinct fellowship, distinguished from others using the same name in that we are a "peace church". I have been an evangelist in this work since 1940 and have been using the facilities of radio broadcasting to preach the gospel for nearly four years. I am comparatively well known in an area which has a radius of about 100 miles.

The fellowship in which I am associated is not marred by alien political principles that might undermine the way of life known in this nation. We do NOT advocate the overthrow of our government. We, in our services, pray for our rulers and teach that this should be done by all disciples in this fellowship.

We are ever grateful for the privileges allowed us as conscientious objectors in this great nation and by firmly standing for the principles of peace and not donning the uniform of a soldier we are only exercising the privileges allowed us as citizens in this country. WE, IN THIS FELLOWSHIP ARE RELIGIOUS CONSCIENTIOUS OBJECTORS, not political objectors. We have no more right to push conscientious objection upon the nation than the nation does to push

military training and service upon the religious conscientious objector of the church of Christ. The Church of Christ was established by the Prince of Peace, given birth in peace, is the institution to which we are called in peace, bears peace as a fruit of the Spirit, and must grow and perpetuate itself by peaceful means. The weapons of carnal warfare cannot be borne by members of the Church of Christ or her members. We are not conscientious objectors to military legislation as long as that military legislation provides for and recognizes the conscientious objectors objections to military service and training.

JAMES W. RUSSELL, Evangelist
Church of Christ.

STATE OF CALIFORNIA,
County of Fresno.—ss.

On this 10th day of November, 1952, before me, the undersigned, A Notary Public in and for said County, personally appeared

Mr. James W. Russell

known to me to be the person whose name is subscribed to the within instrument and acknowledged that he executed the same

Witness my hand and official seal
(SEAL) D. E. PAULL
Notary Public in and for said County and State.
My Commission Expires Feb. 18, 1956.

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statutory provisions involved	2
Statement	4
Argument	9
Conclusion	15
Appendix	16

CITATIONS

Cases:

Connelly v. *United States*, 79 F. 2d 373	12
Cox v. *United States*, 332 U.S. 442	9, 10
Estep v. *United States*, 327 U.S. 114	9, 10
Lichter v. *United States*, 334 U.S. 742	11
Muench v. *United States*, 96 F. 2d 332	12
United States v. *Cohen*, 177 F. 2d 523, certiorari denied, 339 U.S. 914, rehearing denied, 339 U.S. 936	13
United States v. *Morton Salt Co.*, 338 U.S. 632	11

Statutes and regulations:

Selective Service Act of 1948, 62 Stat. 604:	
Sec (j)	2
Sec. 10(b)(3)	4
Universal Military Training and Service Act, 65 Stat. 75:	
Sec. 1(q) (50 U.S.C. App. (Supp. V), 456(j))	2
Selective Service Regulation, 32 C.F.R. (1951 ed.), 1622.14, 1624.1:	
Sec. 1622.14	6
Sec. 1624.1	6

Miscellaneous:

F.R. Crim. P., Rule 52(a)	13

In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 487

TED VERNON HEAD, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 193-199) is reported at 199 F. 2d 337.

JURISDICTION

The judgment of the Court of Appeals was entered on October 8, 1952. On October 23, 1952, Mr. Justice Clark extended the time for filing a petition for a writ of certiorari until December 7, 1952, and on December 8, 1952, a petition was filed.[1] On

[1] December 7, 1952, fell on Sunday.

January 8, 1953, Mr. Justice Clark granted the Government's request for an extension of time for filing its response until February 9, 1953. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether there was a basis in fact for the action of the Selective Service System in classifying petitioner, a conscientious objector, 1-A-O (available for noncombatant military service only) rather than IV-E (opposed to both combatant and noncombatant training and service).

2. Whether the trial court erred: (a) in its instructions to the jury; (b) in failing to instruct the jury to disregard an allegedly improper argument made on behalf of the Government; and (c) in limiting the interrogation of witnesses by petitioner.

STATUTORY PROVISIONS INVOLVED

Section 6(j) of the Selective Service Act of 1948, 62 Stat. 604, 612-613, provides: [2]

> Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously

[2] As amended by Section 1(q) of the Universal Military Training and Service Act of June 19, 1951 (65 Stat. 75, 86, 50 U.S.C. App. (Supp. V), 456(j)), Section 6(j) of the Act of 1948 differs from the original provision in providing for civilian work of national importance instead of complete deferment for persons found to be opposed to both combatant and noncombatant service.

opposed to participation in war in any form. Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code. Any person claiming exemption from combatant training and service because of such conscientious objections whose claim is sustained by the local board shall, if he is inducted into the armed forces under this title, be assigned to noncombatant service as defined by the President, or shall, if he is found to be conscientiously opposed to participation in such noncombatant service, be deferred. Any person claiming exemption from combatant training and service because of such conscientious objections shall, if such claim is not sustained by the local board, be entitled to an appeal to the appropriate appeal board. Upon the filing of such appeal, the appeal board shall refer any such claim to the Department of Justice for inquiry and hearing. The Department of Justice, after appropriate inquiry, shall hold a hearing with respect to the character and good faith of the objections of the person concerned, and such person shall be notified of the time and place of such hearing. The Department of Justice shall, after such hearing, if the objections are found to be sustained, recommend to the appeal board that (1) if the objector is inducted into the armed forces under this title, he shall be assigned to

> noncombatant service as defined by the President, or (2) if the objector is found to be conscientiously opposed to participation in such noncombatant service, he shall be deferred. If after such hearing the Department of Justice finds that his objections are not sustained, it shall recommend to the appeal board that such objections be not sustained. The appeal board shall, in making its decision, give consideration to, but shall not be bound to follow, the recommendation of the Department of Justice together with the record on appeal from the local board. Each person whose claim for exemption from combatant training and service because of conscientious objections is sustained shall be listed by the local board on a register of conscientious objectors.

Section 10(b)(3) of the Selective Service Act of 1948, 62 Stat. 604, 620,50 U.S.C. App. (Supp. V) § 460(b)(3) provides in pertinent part:

> Appeal boards within the Selective Service System shall be composed of civilians who are citizens of the United States and who are not members of the armed forces. The decision of such appeal boards shall be final in cases before them on appeal unless modified or changed by the President. * * *

STATEMENT

On February 20, 1952, a one-count indictment was returned in the District Court for the Western District of Oklahoma charging petitioner with knowingly failing and refusing to submit to induction into the armed forces, in violation of the Uni-

versal Military Training and Service Act, 50 U.S.C. App. (Supp. V) 462 (R. 1-2). Following trial to a jury, petitioner was found guilty as charged and sentenced to three years' imprisonment (R. 4). On appeal, petitioner did not deny his refusal to submit to induction, but contended that his 1-A-O classification had no basis in fact, and that, accordingly, the trial court should have granted his motion for acquittal. The Court of Appeals for the Tenth Circuit unanimously affirmed the conviction, holding that there was a factual basis for the 1-A-O classification (R. 193-199).

The events preceding petitioner's classification and subsequent refusal to submit to induction are as follows:

On September 16, 1948, petitioner registered with his local board (R. 33). In his classification questionnaire, he did not sign Series XIV, Conscientious Objection to War, and on May 13, 1949, the local board classified him 1-A (available for military service) (R. 34-35). On October 31, 1950, he was notified to report for his physical examination (R. 36). On November 7, 1950, he requested a transfer from Oklahoma to California for physical examination (R. 36). Subsequently, on November 26, 1950, following his physical examination, he was notified that he had been found acceptable for induction into the armed services (R. 38). Meanwhile, however, on November 10, 1950, petitioner for the first time requested the special form for conscientious objectors (R. 37).

On the special form, which he filed with the local board on December 13, 1950, petitioner stated that by reason of his religious training and belief he was opposed to participation in war in any form, and, further, that he was conscientiously opposed to participation in noncombatant training or service in the armed forces. Accordingly, he claimed deferment as provided in § 6(j) of the Selective Service Act of 1948 (Gov. Ex. 2, R. 38). On January 4, 1951, the local board changed petitioner's classification from 1-A to 1-A-O (R. 39).

On January 10, 1951, without requesting the opportunity of a personal appearance before the local board,[3] petitioner perfected an appeal to the Appeal Board for the State of Oklahoma. On January 24, 1951, the Appeal Board determined that petitioner should not be classified in either 1-A-O or IV-E[4] (R. 40), and forwarded petitioner's file to the Department of Justice for an advisory recommendation (R. 41). The usual investigation of petitioner's character and reputation was made by the F.B.I., and an opportunity was afforded petitioner to appear before a hearing officer in

---

[3] Selective Service Regulation § 1624.1 gives registrants the right to appear in person before the local board if a written request therefor is filed within ten days after Notice of Classification has been mailed. See 32 C.F.R. 1624.1 (1951 ed.).

[4] Class IV-E was the classification formerly provided by Selective Service Regulation for persons opposed to both combatant and noncombatant training and service. Class IV-E has since been superseded by Class 1-0, Conscientious Objector available for civilian work contributing to the maintenance of the national health, safety, or interest. See Selective Service Regulation § 1622.14 (32 C.F.R. 1622.14 (1951 ed.)).

Oklahoma City. This, petitioner failed to do. On June 27, 1951, the hearing officer recommended that petitioner be classified 1-A-O, and that, if he should be inducted into the land or naval forces, he be assigned to noncombatant duties (Gov. Ex. 6).[5] The Department of Justice, by a letter dated July 23, 1951, concurred in that recommendation, and on October 10, 1951, the state appeal board sustained the action of the local board in classifying petitioner 1-A-O (R. 43).

Petitioner's Selective Service file, which was before the appeal board at the time it affirmed the 1-A-O classification, contains the following pertinent facts:

(1) Petitioner, who in 1949 moved from Oklahoma to California and, in 1950, became a member of the Church of Christ at Waterford, California, answered questions 3 and 4 of the Special Form for Conscientious Objectors as follows (Gov. Ex. 4):

> 3. Explain how, when, and from whom or from what source you received the training and acquired the belief which is the basis of your claim * * *.
>
> How? By the teaching of the church. When? Since I have been a member of the church. From what source? From the preachers and teachers of the church.
>
> 4. Give the name and present address of the

---

[5] The report of the hearing officer, which is part of Gov. Ex. 6 (see R. 46-47), is reprinted as an appendix to this brief, *infra*, pp. 16-22.

individual upon whom you rely most for religious guidance.

J. F. Thomasson, Waterford, California.

(2) The report of the hearing officer, in summarizing the findings of the F.B.I. investigation, stated that a minister of the Church of Christ at Waterford had advised that:

> * * * the teachings of the church are not to engage in carnal warfare which means the bearing of arms in time of war and the killing of other people; that all of the Churches of Christ do not subscribe to this same teaching and it is a matter to be handled by each church; *that the church had no objection to a member engaging in medical corps work* * * *. [Emphasis supplied.]

The hearing officer noted further that, while many persons had testified as to the registrant's sincerity, good reputation, and strong religious beliefs, he had never given public expression to his beliefs concerning participation in war. In concluding, the hearing officer remarked that a better understanding of petitioner's position might have been obtained if he had appeared personally. (Gov. Ex. 6, see Appendix, *infra,* p. 21).

On December 4, 1951, petitioner reported to the Induction Center at Oklahoma City, but refused to be inducted into the armed services (R. 70).

ARGUMENT

Petitioner admitted wilfully refusing to submit to induction into the armed forces (R. 121). His only defense at the trial was that he had been classified as available for non-combatant service (Class 1-A-O) without any proper basis in his Selective Service file. In his petition for a writ of certiorari, petitioner, in effect, renews his claim that he was improperly classified by the Selective Service System (Pet. 15, 18, 21, 22),[6] and, in addition, alleges that errors in the trial court prejudiced his efforts to establish this defense at the trial (Pet. 10, 11, 13). There is no merit in these contentions.

(1) This Court held in *Cox* v. *United States,* 332 U.S. 442, and *Estep* v. *United States,* 327 U.S. 114, that the scope of judicial review of Selective Service System classifications is strictly limited.

---

[6] Petitioner refers to the failure of the trial court to make a finding as to the existence of any basis in the file (Pet. 15), but this is not now presented as an independent source of error. While, as this Court has said, the question whether there is any basis in fact for the given classification is properly one for the judge, *Cox* v. *United States,* 332 U.S. 442, 453, it does not follow that petitioner was prejudiced in any way by its submission to the jury. In the instant case, as the Court of Appeals pointed out, the trial court did deny petitioner's motion for a directed verdict based on the ground that there was no basis in fact to justify the 1-A-0 classification given by the local board. Moreover, counsel for petitioner by his tendered instruction No. 2 (R. 170-171) in effect requested the court to submit to the jury the question whether or not the board had acted without evidentiary basis in the file.

In *Cox* v. *United States, supra,* it was said (332 U. S. at 453):

> * * * when a court finds a basis in the file for the board's action that action is conclusive. The question of the preponderance of evidence is not for trial anew. It is not relevant to the issue of the guilt of the accused for disobedience of orders.

Classifications founded upon a basis in fact "are final even though they may be erroneous." *Estep* v. *United States, supra,* at 122.

The present case falls within the scope of the *Cox* and *Estep* cases. There is a "basis in the file" in that the Report of the Hearing Officer, which was before the appeal board, set forth that a minister of the Church of Christ at Waterford [7] had indicated that the church did not object to a member's engaging in medical corps work (Gov. Ex. 6, Appendix, *infra,* p. 20). While the local board did not have this information at the time it made its initial 1-A-O classification, the statement was received prior to the time the Department of Justice made its advisory recommendation and was included in the record upon which the final decision of the state appeal board was based (R. 46).

Petitioner now, for the first time, submits affidavits tending to show that the statement attributed to Thomasson did not truly represent his views or those of his church (see Pet. 21-22, Ap-

[7] This, presumably, was Thomasson, the minister named by petitioner as the person he relied upon for religious guidance.

pendix B. pp. 4-14), and petitioner argues, further, that even if it did, he would not be bound by the beliefs of his religious leader (Pet. 22). Whether or not there is any merit in these contentions, this is not the time to consider them. Petitioner made no attempt to present his views before the local board following his initial 1-A-O classification and, thereafter, did not appear personally or present evidence before a Department of Justice Hearing Officer, although given an opportunity to do so. Having failed to take advantage of the procedure specifically afforded by Congress, petitioner can not now seek to raise what should properly have been raised at the administrative hearing. See *United States* v. *Morton Salt Co.*, 338 U. S. 632, 653-654; *Lichter* v. *United States*, 334 U. S. 742, 791-793.

(2) Petitioner's objections based on the alleged trial errors are without merit.

(a) In its first instruction to the jury, the court correctly instructed the jury that the registrant should be placed in the lowest class for which he is determined to be eligible, and that Class IV-E was lower in rank than 1-A-O, the classification ultimately given (R. 144-145). Later, at the close of Instruction No. 8, the court stated that although the facts contained in the file might justify a IV-E classification, the board had the right to grant a 1-A-O classification "if it felt under the facts that the defendant should be [so] classified" (R. 152). While this single sentence, which is now cited as erroneous by petitioner, is supposedly misleading,

the instructions when read as a whole can not be held objectionable. As the Court of Appeals observed, "The jury were clearly told that the local board was required to base its findings on evidence in the file and to act in accordance with the Act and the regulations and standards therein prescribed."

Furthermore, since no objection was made to the sentence now alleged to be erroneous, either at the time it was given or subsequently, the alleged error can not be considered on appeal. *Connelly* v. *United States,* 79 F. 2d 373 (C. A. 3); *Muench* v. *United States,* 96 F. 2d 332 (C. A. 8). In view of the court's apparent readiness to correct other errors brought to its attention (see R. 153-157), it seems certain that had this asserted discrepancy been called to its attention, steps would have been taken to clarify the matter.

(b) At the close of his argument to the jury, counsel for the government stated (R. 139):

> Gentlemen, after the proof you have heard * * * if you come in with a verdict of not guilty I guarantee you no other draft board would come up here and tell you they haven't had but one. They will have nothing but pretended conscientious objectors . . .

Counsel for petitioner asked that the jury be instructed to disregard this remark, and the court responded (R. 139):

> Well, the jury is supposed to have good common sense and they can exercise it.

While at the time counsel for petitioner thanked the court for having given this admonition, he now claims that the impropriety was not adequately remedied. We submit that the court's remark strongly implied that the statement in question should be disregarded. In any event, it is inconceivable that this single questionable incident in a carefully conducted trial could have substantially influenced the jury, so that, if error, it was not of such seriousness as to "affect substantial rights" of petitioner. See Rule 52(a), F. R. Crim. P.; *United States* v. *Cohen,* 177 F. 2d 523 (C.A. 2), certiorari denied, 339 U. S. 914, rehearing denied, 339 U. S. 936.

(c) Finally, petitioner was not precluded from presenting evidence tending to show the lack of a basis in fact for his 1-A-O classification (Pet. 13). The first instance of allegedly improper limitation of direct examination involved an attempt to question the clerk of the board concerning substantive matters clearly beyond her competence (R. 63). The second and third such instances referred to in the petition involved attempts by counsel to question a member of the local board concerning the content of petitioner's Selective Service file (R. 75-76). It was apparent to the court, after questioning covering several pages in the record, that the witness had no recollection of its contents. Petitioner fails to disclose that the court, after stopping the questioning, stated that the witness should review the file during the noon recess, after which further interrogation would be permitted. The

fourth instance occurred after counsel had previously attempted without success to elicit from a member of the local board the admission that the board had considered the fact that a IV-E classification meant complete exemption from military or civilian duties (R. 99). This line of inquiry was clearly proceeding nowhere at the time it was terminated, and, moreover, was of doubtful relevance on the issue of whether or not there was a factual basis in the file for the board's action. The final instance related to an attempt to introduce a conversation which a defense witness had had with the clerk of the board (R. 111). Objection to this was properly sustained since the testimony could have revealed no more than the witness' recollection of the clerk's opinion as to the practices and attitudes of the board.

In this case, the sole question in issue was whether there was a basis in the file for sustaining the board's action. On that question the file, itself, was the best evidence, and it was before the court and the jury (R. 47).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

WALTER J. CUMMINGS, JR.,
Solicitor General.

WARREN OLNEY III,
Assistant Attorney General.

BEATRICE ROSENBERG,
HOWARD ADLER, JR.,
Attorneys.

FEBRUARY 1953.

APPENDIX[8]

Report of Hearing Conducted by the Department of Justice Pursuant to the Selective Service and Training Act of 1948

Preliminary Statement

Name and Address of Registrant:

Ted Vernon Head, Jr.
1940 Bishop Avenue
Stockton, California

Questionnaires Filed:

SSS Form No. 100 filed—Not shown
SSS Form No. 150 filed December 13, 1950

Nature of Claim for Exemption:

From both combatant and noncombatant military service.

Action by Local Board:

January 4, 1951 classified I-A-O

Action by Board of Appeal:

Appeal Board for the State of Oklahoma determined registrant should not be classified in

---

[8] The report of the hearing officer, printed herein as an appendix, was introduced at the trial as part of petitioner's Selective Service file, Gov't Exh. 6 (R. 46-47). However, it was not included in the exhibits certified to this Court by the clerk for the Court of Appeals for the Tenth Circuit. The United States Attorney also was unable to locate the documents actually used at the trial, but upon our request forwarded to us a signed carbon copy of the hearing officer's report.

either Class I-A-O or Class IV-E under the circumstances set forth in sub-paragraphs (2) and (4) of paragraph (a) of Section 1626.25 of the Selective Service Regulations, and therefore forwarded registrant's file to the Department of Justice for an advisory recommendation pertaining to said conscientious objection claim.

DATE FILE RECEIVED BY THE DEPARTMENT OF JUSTICE:

March 9, 1951

DATE FILE INCLUDING INVESTIGATIVE REPORT OF FEDERAL BUREAU OF INVESTIGATION RECEIVED BY HEARING OFFICER:

May 15, 1951

DATE OF GIVING NOTICE OF HEARING:

May 15, 1951

HEARING HELD PURSUANT TO NOTICE:

Hearing held June 2, 1951, at ten o'clock A.M. in 404 Fidelity National Bank Building, Oklahoma City, Oklahoma. Registrant was not personally present, but mailed many statements.

STATEMENT OF FACTS

1. Your hearing officer reviewed the entire file but was unable to interrogate registrant as he did not appear personally at the hearing.

2. The file reflects that this registrant was born at Lawton, Oklahoma, July 19, 1929; that he com-

pleted 11 years of elementary school and four years of junior high school and two years of high school, and that he is not married; that he had worked on Saturdays at the Lawton Produce delivering chickens; that he had been doing this one year, but did not expect to continue in this work.

3. His SSS Form 150 reflects registrant believes in a Supreme Being.

Describing the nature of his belief which is the basis of his claim he says, "My belief is based upon the Bible, and I believe its tenets are against war in any form. Yes, my belief in a Supreme Being involves duties which are superior to those arising from any human relation".

Explaining the source of his training, he says: "How? By the teachings of the church. When? Since I have been a member of the church. From what source? From the preachers and teachers of the church."

He relies for religious guidance upon T. F. Thomasson, Waterford, California.

He believes in the use of force "under no circumstances".

Describing the actions and behavior in his life most conspicuously demonstrating the consistency and depth of his religious convictions, he says: "Devoted attendance at the services of the church. I do not drink, smoke, dance or attend public amusement places. My convictions are so deep in this regard, that I do not let my family or fellow workers interfere, even though they try".

He has never given public expression as to his beliefs.

His parents are Ted Vernon, Sr. and Clara H.

Head, 1709 Baldwin, Lawton, Oklahoma, each of whom were reared in the Catholic Church.

Registrant is a member of the Church of Christ, having become a member "by faith, repentance, confession of Christ and immersion" in March, 1950 at Waterford, California.

Describing the creed of his religious sect or organization, he says: "the creed of the church of Christ is the Bible. The following is from that source. Jesus commanded 'put up thy sword' (Matt. 26:48-52) Jesus said, 'Love your enemies' (Matt. 5:45-48) Paul said, 'avenge not yourselves; vengeance belongeth to God' (Rom. 12:19-21); Paul further said, 'The weapons of our warfare are not carnal' (2 Cor. 10:3-5) and 'we wrestle not against flesh and blood' (Eph 6-10:17)".

He gives as references, M. F. Barker, Grocery, Gen. Del. Waterford, California; Jim Massengale, Contractor, Hickman, California; Roy Arnett, Farmer, Route 1 Box 412 Waterford, California; and Darnold B. McCord, Evangelist, 552 North Wabash, Glendora, California.

4. Investigation of the Federal Bureau of Investigation shows at Yakima, Washington, reference interviewed and advised registrant in his opinion sincere in belief of Church of Christ and the viewpoint of church regarding entering the Armed Forces.

Employers and acquaintances of registrant at Lawton, Oklahoma regard him as being of good character and reputation, but know little about his religious activities or beliefs; a band instructor in the Lawton High School advised registrant played in the band; that he was an average student, par-

ticipated in initiations which were rather severe; that the registrant at no time discussed his religious beliefs.

An employer at Lawton, Oklahoma advised he was a good, willing worker, appeared to be honest and of good character; knew nothing regarding registrant's religious beliefs.

A check with two Church of Christ Ministers at Lawton, Oklahoma revealed registrant is not a member of either church.

There is no police record at Lawton, Oklahoma.

At Waterford, California, a minister of the Church of Christ advised the teachings of the church are not to engage in carnal warfare which means the bearing of arms in time of war and the killing of other people; that all of the Churches of Christ do not subscribe to this same teaching and it is a matter to be handled by each church; that the church had no objection to a member engaging in medical corps work; that registrant joined the church in March, 1950, and had since that time attended church regularly; that he does not drink or smoke, and follows the teachings of the church.

A groceryman, a member of the Church of Christ, believes registrant is conscientious in his objection to military service.

No record at the Sheriff's office or Retailers Credit Association at Modesto, California.

At Stockton, California, a witness who lives across the street from the brother-in-law of subject, advises he has seen nothing which would indicate that registrant has strong religious beliefs.

Neighbors at Stockton, California are unable to

give any information concerning registrant's religious beliefs.

An employer advised registrant had worked for the company as a laborer; that he did not know the subject personally but understood he bore the nickname of "the preacher" among fellow workers in his plant.

The foreman of a company for whom registrant worked advised that he had noticed registrant reading the Bible during his lunch period, and that he appeared sincerely interested in his religion.

Conclusion

After a review of all of the statements contained and shown in the file, and the various instruments furnished by the registrant many of which had no bearing on the issues involved in this case, and while the evidence in this case points to a very commendable way of living on the part of registrant, yet it is the conclusion of your hearing officer that the conscientious objections of the registrant did not come about until after the registrant had registered, and his activities in his church increased at once. It is possible that if the registrant had seen fit to appear personally a better understanding of his position could be had, but your hearing officer from the evidence before him, is not convinced that he is entitled to a IV-E classification, but that he should be classified I-A-O.

Recommendation

It is, therefore the recommendation of your hearing officer that the conscientious objection of the registrant to combatant military service be

sustained and that he be classified in Class I-A-O and if inducted into the land or naval forces that he be assigned to non-combatant duties as defined by the President.

(S.) R. A. BELISLE,
Hearing Officer,
404 Fidelity National Bank Building,
Oklahoma City, Oklahoma.

DATED JUNE 27, 1951.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1953 241857 1131